APPENDIX A

Judgment Of The United States District Court For The Northern District Of Illinois, Eastern Division, May 6, 1980

BOHUMIL DUSANEK,

Plaintiff,

No. 77 C 3985 v.

JOSEPH P. HANNON, RAYMOND C. PRINCIPE, JOHN O'DONNELL, M.D., and BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendants

Filed Jury verdict for the plaintiff and against defendants Board of Education and Dr. John O'Donnell and assess plaintiff's damages at $100,000.00. Jury further finds for the following defendants and against the plaintiff as to them: Joseph P. Hannon and Raymond Principe. Enter Judgment on Jury verdict consistent with answers to interrogatories. Post trial motions may be filed according to the rule.

/s/ LEIGHTON, J.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 80-1988 & 81-1527

BOHUMIL J. DUSANEK,

Plaintiff-Appellee,

v.

JOSEPH P. HANNON, RAYMOND C. PRINCIPE, JOHN O'DONNELL, M.D., and THE BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-3985—George N. Leighton, *Judge.*

ARGUED JANUARY 4, 1982—DECIDED APRIL 26, 1982

Before PELL, *Circuit Judge*, MARKEY, *Chief Judge*,* and SPRECHER, *Circuit Judge.*

PELL, *Circuit Judge.* The appellee brought this action seeking injunctive relief and damages pursuant to 42 U.S.C. § 1983 (1976). The appellee's due process claim is that his employer, the appellant Board of Education of the City of Chicago (the "Board"), and the appellants Joseph P. Hannon, Raymond C. Principe, and Dr. John

* Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

O'Donnell, acting in the scope of their employment with the Board in their positions as Superintendent, Director of Teacher Personnel and Staff Psychiatrist, respectively, deprived him of his property interest in his employment without providing a hearing. On May 6, 1980, the jury rendered a verdict in favor of the appellee against the Board and Dr. O'Donnell only. Subsequently, on the appellee's motion for a permanent injunction seeking to reinstate the appellee in his former teaching position, the district court ordered the parties on June 6, 1980 to proceed pursuant to the Board's rules to obtain the opinion of an independent physician as to the appellee's mental health. Based on the report subsequently submitted to the court, the court denied the appellee's motion for injunctive relief seeking reinstatement in his former position. Both the appellee and the appellants filed post-trial motions for attorney's fees pursuant to 42 U.S.C. § 1988 (1976). The district court granted the appellee's motion for attorney's fees and denied that of the appellants.

In No. 80-1988, the appellants are seeking reversal of the jury verdict and the district court's rulings on the post-trial motions for attorney's fees. Consolidated with that appeal is the appeal from the district court's denial of the appellee's motion for permanent injunctive relief in No. 81-1527. The threshold issue for our resolution is whether the actions of the Board and its employees did, indeed, result in a deprivation of due process under the Fourteenth Amendment.

I. Factual Background

A. The Statutory and Administrative Procedure for Teachers' Leaves of Absence for Illness.

According to Principe's testimony and Board Rule 4-44, when a principal has reason to believe that a teacher has a health problem which may impair his or her efficiency, the principal may send a letter to the Department of Personnel requesting that the General Superintendent schedule a health examination for the employee. If the District Superintendent agrees to the request, a form letter is prepared for the

Superintendent's signature. When signed, the letter is then sent to the employee directing him or her to appear for a health examination. If the Board's Medical Director, who is responsible for these health examinations, determines that the employee does not meet the medical standard for teaching, the Director reports the results to the Department of Personnel. The Department then notifies the employee by a form letter of the result of the examination. If the employee failed to meet the medical standard for teaching, the form letter requests the employee to execute an illness leave of absence and to contact the Board's office to arrange another health examination if he or she wishes to obtain reinstatement. The form letter also states:

> Please be advised that if you fail to request an illness leave of absence within ten business days from the date of this letter, it will be recommended that your services be terminated in accordance with State Statute.

The procedure for removal of a tenured teacher for cause is governed by the Illinois School Code, Ill. Rev. Stat. ch. 122, § 34-85 (1975), which provides, *inter alia*, an opportunity for a hearing prior to removal with resort to judicial review.

Board Rule 4-33 governs the duration of teachers' leaves of absence for illness. Any teacher who is granted a leave of more than five school months is required to pass a health examination by a medical examiner selected by the Board's General Superintendent prior to reinstatement. If the teacher fails the health examination, he may request an additional medical opinion as provided by Board Rule 4-19. Rule 4-19 allows the teacher to request an additional medical opinion within ten days from the notice of having failed the Board's examination. If the two medical opinions are in disagreement, a third medical opinion is obtained in the same manner and the majority opinion of the examiners is final.

B. The Appellee's Examination and Leave of Absence.

From September, 1964 to March, 1977, the appellee Dusanek was a tenured teacher at Schurz High School in Chicago. On March 2, 1977, Dusanek complained to the principal, Dr. James Maloney, about a student in his class. Dusanek told Dr. Maloney that a new girl in his class was there to disrupt his class and turn the other students against him. He claimed to know her purpose in his class because she had been involved in this same behavior in one of his classes sometime between 1967 and 1969. At that time, according to Dusanek, she had been accompanied by a heavy-set woman in bib overalls about six feet six inches tall. Dr. Maloney asked Dusanek to put his observations in a memorandum, which Dusanek subsequently did. Dr. Maloney also testified that he noted in the meeting that Dusanek was staring over his shoulder and appeared uneasy and apprehensive.

Dr. Maloney then examined the school records of the student about whom Dusanek had complained, from which he determined that she was born in 1960 and appeared to be about sixteen or seventeen years old. He also talked to two teachers about Dusanek. The information they provided about Dusanek tended to support Dr. Maloney's initial impression of Dusanek's psychological condition. As a result of his investigation, Dr. Maloney wrote the Assistant Superintendent of the Personnel Department requesting that the General Superintendent schedule a health examination for Dusanek.

Thereafter Principe, the Director of the Board's Bureau of Teacher Personnel, received Dr. Maloney's letter requesting an examination of Dusanek. After consulting with Dr. Maloney, he directed his secretary to prepare a form letter dated March 14, 1977, to be signed by Superintendent Hannon, directing Dusanek to report to the Board's offices on March 28, 1977, for an examination. The letter was subsequently signed by the Superintendent and sent to Dusanek.

The appellant, Dr. John O'Donnell, conducts psychiatric examinations for the Board. Prior to Dusanek's

examination, he contacted Dr. Maloney who informed him of his conversation with Dusanek and the results of his investigation. On March 28, 1977, Dr. O'Donnell examined Dusanek and concluded that Dusanek was not in satisfactory psychological condition to continue his teaching duties. Dusanek was informed of his failure to meet the medical standard for teaching in a form letter dated March 29, 1977. It was this form letter which directed Dusanek to execute the enclosed request for a leave of absence for illness within ten days from the date of the letter, or it would be recommended that his services be terminated in accordance with the procedures of the state statute governing removal of tenured teachers. On April 5, 1977, Dusanek executed the request for a leave of absence due to illness. Dating from March 29, 1977, Dusanek was placed on a leave of absence.

At Dusanek's request, Dr. O'Donnell gave him a second examination in July, 1977. Dr. O'Donnell found that Dusanek was not in condition to return to his position, and concluded that Dusanek should continue in therapy with his own psychiatrist who had been treating Dusanek for several years. In a letter dated August 19, 1977, Dusanek was again informed that he did not meet the medical standard for teaching. The letter also requested that Dusanek execute the enclosed request for a leave of absence, which Dusanek did. On October 27, 1977, Dusanek filed this suit claiming the Board and its employees had deprived him of a property interest in his employment without due process.

C. The Report of Dr. John Hanni Pursuant to the District Court's Order.

Prior to ruling on the appellee's post-trial motion for injunctive relief seeking reinstatement, the district court ordered the parties to proceed pursuant to Board Rules 4-33 and 4-19 to obtain an independent medical opinion as to Dusanek's ability to return to his position. Dr. John W. Hanni submitted his report on Dusanek to the court on March 13, 1981. He concluded that Dusanek suffered

from a "paranoid schizophrenic disorder which is chronci, with marked impairment of social functioning." He also concluded that Dusanek's mental condition at the time of Dr. Hanni's examination had existed since at least March of 1977, but was "obviously of longer duration." Based on Dr. Hanni's report, the district court denied Dusanek's motion for injunctive relief seeking reinstatement.

II. Dusanek's Claim of Denial of Due Process.

Dusanek's position as a tenured teacher was sufficient to create an entitlement to a property interest under the law of Illinois. Having created such an entitlement, the state could not deprive Dusanek of his position without first affording him due process. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972).

There is no question that the Board and its employees complied with the Board's rules and the state statutes in their procedural treatment of Dusanek. We do not find this statutory and administrative procedure to be somehow arbitrary or unreasonable.

There is nothing unconstitutional about a state establishing a tenure system in which the state retains the prerogative to discontinue the teaching duties of teachers who are not physically or mentally competent to continue teaching. In any such system, some school official must be lodged with the preliminary authority to request a medical investigatory procedure. The Illinois procedure whereby certain school authorities can require teachers who may have medical difficulties to submit to medical examinations obviously serves strong state interests. Only disabilities which impair the efficiency of a teacher may be the basis for requiring a health examination, and a health examination must be conducted before a teacher is asked to request a leave of absence. When the result of that medical examination is adverse to a teacher, the Illinois procedure permits the teacher either to request a medical leave of absence, or to fight his or her removal by refusing to take such a

leave, thereby triggering rights to a hearing. The teacher is given the option of a hearing before any property interest is taken away. Certainly the facts in the record support Dr. O'Donnell's conclusions and the principal's original decision to commence the process that resulted in Dusanek's medical examination. We are of the opinion that these procedures are all that Illinois need reasonably provide to assure a fair and reasonable determination satisfying due process.

Dusanek contends that the March 29 letter compelled him to take a leave of absence. The availability of recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the complainant merely declines or fails to take advantage of the administrative procedure. *See, e.g., Palma v. Powers*, 295 F. Supp. 924, 940 (N.D. Ill. 1969); *Marlowe v. Village of Wauconda*, 91 Ill. App. 3d 874, 883 (1981); *Rawlings v. Illinois Department of Law Enforcement*, 73 Ill. App. 3d 267, 275 (1979); *cf. Brooks v. Board of Trustees of the University of Illinois*, 90 Ill. App. 3d 591, 592 (1980). These decisions do not amount to a requirement of exhaustion of administrative remedies as a predicate to a section 1983 claim. Rather, they express the logical proposition that a state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them. Because the procedural protections existed, the state cannot be accused of withholding them in a section 1983 suit. *Cf. Parratt v. Taylor*, 451 U.S. 527 (1981).

We conclude that it is not a deprivation of due process of law to be put to the option of defending oneself in a proper dismissal hearing or voluntarily accepting a change in one's job status, when the state's action in first initiating the medical investigation is reasonable and in full compliance with the conditions of the teacher's tenure. Significantly, the letter states only that dismissal proceedings would be *recommended* if Dusanek failed to request a leave of absence. The appellant has suggested that continued performance of his duties in the face of the letter's directive would have been grounds for removal for cause, the cause being insubordination. This

assertion is unsupported by the record. Moreover, we see nothing in the Board's rules or the state statute which would have precluded Dusanek from demonstrating his competency in a removal hearing.

This question of coercion by the state resulting in a deprivation of procedural rights may best be analogized to those cases in which a government employee seeks procedural review of his or her resignation as a "discharge" coerced by the actions of the federal government. As stated in *Paroczay v. Hodges*, 219 F. Supp. 89, 90 (D.D.C. 1963), "[i]f the resignation was involuntarily given . . . then plaintiff's separation from government employment constituted a discharge, and he would be entitled to certain procedural rights . . . ." These cases indicate that a resignation resulting from a choice between resigning or facing proceedings for dismissal is not tantamount to discharge by coercion without procedural review if the employee is given sufficient time and opportunity for deliberation of the choice posed. *See, e.g., Dabney v. Freeman*, 358 F.2d 533 (D.C. Cir. 1959); *Competello v. Jones*, 267 F.2d 689 (D.C. Cir. 1959); *Paroczay v. Hodges*, 219 F. Supp. 89 (D.D.C. 1963); *see also Molinar v. Western Electric Co.*, 525 F.2d 521 (1st Cir. 1975), *cert. denied*, 424 U.S. 748 (1976) (applying New York law); *Johnson v. General Motors Corp.*, 144 Ga. App. 305, 241 S.E.2d 30 (1977) (applying Georgia law), *cert. denied*, 437 U.S 905 (1978); *Wilkinson v. Trust Co. of Georgia Association*, 128 Ga. App. 473, 197 S.E.2d 146 (1973) (applying Georgia law).

III. Conclusion.

For these reasons, we conclude that there was no denial of due process by the state and, accordingly, reverse the judgment in No. 80-1988 and the district court's award of attorney's fees to the appellee. We affirm the district court's denial of the appellee's post-trial motion for permanent injunctive relief seeking reinstatement in No. 81-1527. We affirm the district court's denial of attorney's fees to the appellant as the district court did not abuse its discretion in concluding that the

action was not frivolous, unreasonable, or without foundation. *Reichenberger v. Pritchard*, 660 F.2d 280, 288 (7th Cir. 1981).

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

Order Of The United States Court Of Appeals For The Seventh Circuit, June 28, 1982

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

BOHUMIL J. DUSANEK,

Plaintiff-Appellee,

No. 81-1527 vs.

JOSEPH P. HANNON, RAYMOND C. PRINCIPE, JOHN O'DONNELL, M.D., and BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 3985—George N. Leighton, *Judge.*

On consideration of the petition for rehearing filed in the above-entitled cause by petitioner-appellee, Bohumil J. Dusanek, the judges of the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

Statutes And Rules Involved

Chapter 122, Illinois Revised Statutes §34-85 (1961):

§ 34-85. Removal for cause—Notice and hearing—Suspension

No teacher or principal appointed by the board of education shall (after serving the probationary period of 3 years specified in Section 34-84 be removed except for cause, and then only by a vote of a majority of all members of the board, upon written charges presented by the general superintendent of schools, to be heard by the board or a duly authorized committee thereof, after 30 days' notice, with a copy of the charges, is served upon the person against whom they are preferred, who shall have the privilege of being present, together with counsel, offering evidence and making defense thereto. At the request of any party the hearing shall be public. The action and decision of the board in the matter shall be final. Pending the hearing of the charges, the person charged may be suspended as by the rules of the board may be prescribed but such person, if acquitted, shall not suffer any loss of salary by reason of the suspension.

Chapter 122, Illinois Revised Statutes §10-22.4 (1975)

10-22.4 Dismissal of teachers

§ 10-22.4. Dismissal of teachers. To dismiss a teacher for incompetency, cruelty, negligence, immorality or other sufficient cause and to dismiss any teacher, whenever, in its opinion, he is not qualified to teach, or whenever, in its opinion, the interests of the schools require it, subject, however, to the provisions of Sections 24-10 to 24-15, inclusive. Temporary mental or physical incapacity to perform teaching duties, as found by a medical examination, is not a cause for dismissal. Marriage is not a cause for removal.

Rules Of The Board Of Education

Sec. 4-19. Health Examination—Candidate for Certificate. All candidates for certificates, in addition to the academic examination, shall be required to pass a health examination by a medical examiner selected by the General Superintendent of Schools, unless such person is a regularly assigned teacher in the Chicago Public Schools, or has, within a period of one year immediately preceding, successfully passed such health examination in connection with the award of another certificate.

In the event that the candidate does not pass such health examination and within ten days from the notice of such failure, makes written request to the General Superintendent of Schools for additional medical opinion, the General Superintendent of Schools shall select another medical examiner acceptable to both the candidate's personal physician and to the General Superintendent of Schools. If the medical opinions are in disagreement, a third medical examiner shall be selected in the same manner, and a majority opinion of such health examiners shall be final.

Sec. 4-41. Absence Without Leave—Members of Teaching Force. Absence of members of the teaching force, after the expiration of a period of two weeks without written leave of absence or failure to return at the expiration of any leave of absence previously granted, shall, after due notice as hereinafter provided, be deemed and declared to constitute an abandonment of employment by such absentee and an automatic severance of all connections with the Chicago Public School System; provided, however, that before such severance and termination of employment shall become effective under this section a notice in writing shall be sent by registered mail to the absentee member of the teaching force, addressed to the last recorded or last known place of residence, and stating in substance that a failure to report for duty within twenty days from the date of such notice, or to apply for leave of absence if eligible therefor, will be deemed an abandonment of employment and will constitute a surrender of all rights of tenure which might be claimed by

virtue of the former service of such absentee member of the teaching force.

Sec. 4-33. Leave for Illness—Members of Teaching Force. In case of absence exceeding 10 consecutive school days due to personal illness, a full time regularly assigned teacher or principal must apply for and secure a leave of absence pursuant to the provisions of this section. The General Superintendent of Schools shall have authority, subject to the approval of the Board of Education, to grant a leave of absence (without pay except as provided in the "sick pay" rule) to a teacher or principal who shall file a written request therefor, in which case the position shall be held open. Except as hereinafter provided, such leave shall not exceed 5 school months in any school year nor be in excess of a total of 5 school months in any 2 consecutive school years. Upon presentation of proof establishing continued serious personal illness longer than said 5 school months, rendering return to duty impossible, the General Superintendent of Schools, subject to the approval of the Board of Education, may extend a leave of absence granted for personal illness for such additional period not to exceed 25 school months, as in his judgment is warranted by all the circumstances, including the service record of the teacher or principal. In case of an extension for a period of more than five school months, the position shall be declared vacant, but the teacher or principal, upon reporting for duty at the expiration of such extended leave, shall be eligible for immediate assignment to a vacant position equal in rank and be placed at the top of the transfer list to return to his former school if he so desires. Any teacher or principal who is granted an extension of leave for more than five school months as herein provided for, shall be required to pass a satisfactory health examination by a medical examiner selected by the General Superintendent of Schools before return to duty. If he does not pass such examination, he may request additional medical opinion, on the terms and in the manner provided in Sec. 4-19 of these rules.

When a leave has been granted under this section the absence shall not be construed as a break in service of such person on leave so far as seniority of service is concerned. During the period the teacher or principal is entitled to such pay under the rules, the absence shall not be construed as a break in service for any purpose.

In case of absence exceeding 10 consecutive school days due to personal illness, a Full Time Basis (FTB) temporarily certified teacher may apply for and secure a leave of absence without pay, except as provided in the sick pay rule. Such leave shall not exceed 5 school months unless extended, provided however that all leaves granted such temporarily certified teachers shall expire at the end of June with the close of the school term with the expiration of their temporarily teaching certificates.

In the event that a Full Time Basis (FTB) temporarily certified teacher receives another certificate, temporary or regular, through the Board of Examiners for the ensuing school year, he will be eligible to apply for and secure another leave of absence upon presentation of proof of establishing continued serious personal illness. Said extension will be limited to 5 school months and the teacher must pass a health examination by a medical examiner of the Board before returning to teaching.

The replacement of a Full Time Basis (FTB) temporarily certified teacher by a regularly certified teacher or by another temporarily certified teacher in the position he occupied shall not affect the leave as far as eligibility for sick pay is concerned. (Amended 8-23-67)